IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 167 of 1985

Date of decision 16. 8 .2007

Om Parkash .. Appellant

Versus

Man Singh and others .. Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

PRESENT: None for the appellant

None for the respondents

M.M.Kumar, J.

This appeal filed under Section 41 of the Punjab Courts Act, 1918 is directed against the judgement and decree dated 9.11.1984 passed by the learned Addl. District Judge (I) Jind whereby the judgement and decree of the Sub Judge, Safidon dated 25.1.1983 has been upheld and the appeal has been dismissed.

The trial Court on issue No.1 has held that the plaintiff-appellant was not adopted by one Fatta vide registered adoption deed No.107 dated 19.3.1971. It is property of Fatta which is subject matter of litigation. However, the afore-mentioned finding of the trial Court has been reversed by the learned lower appellate Court holding that the factum of adoption was not denied by the defendant- respondents and therefore it held that the adoption was deemed to be proved. Likewise, on issue no.4, the trial Court has held that the plaintiff- appellant was estopped from filing the suit on account of his presence at the time of mutation. The afore-mentioned

finding was also set aside by the learned lower appellate Court by holding that mere presence of the plaintiff- appellant at the time of mutation was not to operate as estoppel against him from claiming title in the suit land being adopted son of Phata. Accordingly, the finding recorded by the trial Court was set aside. On issue no.5, the trial Court had held that the suit was barred by time holding that the limitation to challenge the mutation was one year. However, the learned lower Appellate Court held that the suit for possession filed by the plaintiff- appellant on the basis of title was not barred by time because under Article 65 of the Indian Limitation Act, 1963 it was within time unless the defendant- respondents could prove to have become owner by way of adverse possession. There was no plea raised by the defendant-respondents to the effect that they had become owner by adverse possession and therefore it was held that the suit of the plaintiff- appellant was within time.

On the crucial issue No.6 the trial Court has held that the Will dated 6.4.1971 (Ex.P.1) was not shrouded by suspicious circumstances and that the Will was duly executed by Fatta son of Nanak. The view of the learned lower appellate Court affirming the afore-mentioned finding is discernible from para 14 of the judgement which reads as under:

> " As regards the finding of the trial Court on issue no.6 is concerned, the learned counsel for the plaintiff contended before me that in the present case adoption deed Ex.P.1 is dated 19.3.1971 that the Will is dated 6.4.1971 that the testator is proved to be aged 85 years at the time of execution of the Will, that one witness Phata (DW 3) admitted that he was taken for attesting the Will by Seeria one of the propounder. So he

contended that it would be held that the will is shrouded by suspicious circumstances. It is no doubt true that in the statement of Phata (DW 3) it is there that he was called by the propounder to attest the Will, but this circumstance alone is not sufficient to hold that the Will is not genuine. When we peruse the Will we found that the testator has specified therein that due to adoption of plaintiff by him there is dispute amongst his collaterals, that he does not want that the dispute should remain in the family of Nanak about his property, so he is making a Will whereby he is giving property of Nanak in equal shares to all his nephews and the testator. Phata vide the above Will gave the property to all his heirs. So the Will when perused shows that it is a genuine Will and was made by the testator to keep peace in the family. The Will was got written from a petition writer and it was also got attested from Shri Des Raj Punia (DW 4) Notary Public. The attesting witness of the Will Phata also supported it. So under the above it will be held that due execution of the Will is proved and the Will is not shrouded by any suspicious circumstances. So the finding of the trial Court about the execution of the valid Will is confirmed."

When the appeal was admitted by this Court on 8.2.1985 no question of law was framed nor any question of law is available in the memorandum of appeal. The Will having been found to be genuine had led to the consequence of affirmation of judgement and decree passed by the trial Court subject to the modifications on finding on adoption etc.

The matter is pending since 1985 and it was called up twice.

No one has put in appearance in support of the appeal.

After perusing the memorandum of appeal I am of the considered view that no question of law would arise as I find that the findings with regard to execution and genuineness of the Will are required to be affirmed because it answers all the requirements of Section 68 of the Evidence Act, 1872 and Section 63 of the Succession Act,1925. The afore-mentioned provisions have been subject matter of interpretation of Hon'ble the Supreme Court in large number of cases including Seth Beni Chand v. Kamla Kanwar (1976) 4 SCC 554 and Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003)2 SCC 91. The view of their Lordships in Janki Narayan Bhoir's case (supra) reads as under:

> " Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alone, and subject to the process of the Court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the

will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness atleast has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested atleast by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will

> by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

A perusal of the afore-mentioned para would show that the Will is required to be proved atleast by one of the attesting witnesses who must state that it was attested by two witnesses. If such a witness proves the execution of the Will in terms of clause (c) of Section 63 of the Succession Act, 1925 namely that the Will was attested by two witnesses in the manner contemplated by the provisions then the examination of other witness could be dispensed with. In the present case, DW 4 Des Raj Punia is the attesting witness of the Will. The statement of attesting witness was duly supported by Phata DW 3. He admitted that he was taken by Seeria for attestation of the Will. Accordingly, there is no room for interference in the concurrent

findings on issue no.6 and the appeal is liable to be dismissed.

For the reasons mentioned above, this appeal fails and the same is dismissed.

16.8.2007 **(M.M.Kumar)**
okg **Judge**